



**IT IS ORDERED as set forth below:**

**Date: January 09, 2008**

*James E. Massey*

James E. Massey  
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

\_\_\_\_\_  
IN RE:

CASE NO. 07-75092

Kelvin Terrell New,

CHAPTER 13

Debtor.  
\_\_\_\_\_

JUDGE MASSEY

ORDER DENYING MOTION TO VACATE DISMISSAL ORDER

On the motion of Abbey Road Condominium Association, Inc., the Court dismissed this case in an order entered on November 14, 2007 pursuant to section 521(i) of the Bankruptcy Code on the ground that Debtor had failed to submit all of his pay advices received during the 60 days prior to the petition date, as required by section 521(a)(1)(B)(iv). On November 30, 2007, Debtor moved to vacate the dismissal order and scheduled a hearing for January 9, 2008. Abby Road did not appear at that hearing but filed a response to the motion.

The Court agrees with Abbey Road that section 521(i)(3) provides the only means by which a debtor who has not complied with section 521(a)(1) may avoid automatic dismissal as of

the 46<sup>th</sup> day following the petition date. That section would be meaningless if a debtor could reopen the case more than 46 days after the petition date for the purposes of doing what should have been done within the first 46 days. The Debtor's argument that the court could "order otherwise" fails because such an order must precede the filing of a motion to dismiss. Once such a section 541(i) motion is filed and if the facts support the motion, the court has no discretion to order otherwise.

Debtor's argument that he filed some of the pay advices and could file the missing ones is no help to him because he was required to file all of the advices he received within 46 days of the petition date. The court pointed out at the hearing that the motion to vacate came too late in that it was filed more than ten days after entry of the dismissal order. Debtor's counsel responded that his firm did not have sufficient time to react because three days passed before the BNC served the dismissal order by mail. This argument is without merit for two reasons. First, on reflection the court concludes that the motion to vacate would be without merit even if it had been timely filed. Second, Debtor and his counsel knew when they received the motion to dismiss what the problem was. If the receipt of the dismissal orders is what triggers a reaction at Debtor's law firm, the firm should consider reacting to motions to dismiss when received and not wait until it receives an order of dismissal.

In many cases, section 541(i) motions cost more than they save. If Debtor here re-files, Abbey Road will have incurred the costs of the motion but will be right back in the bankruptcy soup. This is not to say that it did not have the right to file its motion. But the motion to dismiss was based on a technicality that in all likelihood had nothing to do with the fundamental issue in a

Chapter 13 case, which is whether the debtor has sufficient regular income to pay current expenses and to fund the plan.

Debtor had a recent prior case, which might suggest that this case would also be unsuccessful, but because debtors may file multiple cases, sooner or later the debtor and the creditor will deal with the fundamental issue, if the debtor is persistent. If Debtor files a third case prior to June 13, 2008, to obtain a stay, he will have the burden of showing by clear and convincing evidence that he filed the third case in good faith, which would include a showing that he can fund a confirmable plan. Abbey Road could have raised that issue in this case.

For these reasons, Debtor's motion to vacate is DENIED.

\*\*\*END OF ORDER\*\*\*